IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CIV. NO. 80-623-JB

JOSEPH and JOSEPHINE A., et al.,

Plaintiffs,

—v.—

LAWRENCE B. INGRAM, et al.,

Defendants.

ORDER

(Filed March 4, 1982)
(Entered on Docket March 5, 1982)

THIS MATTER having come on for a hearing on Plaintiffs' Motion For Class Certification, and the Court having received evidence, having made its findings of fact and conclusions of law in open court, and having found that the Motion is well taken;

IT IS ORDERED, ADJUDGED AND DECREED that this action be, and hereby is, certified as a class action.

DATED this 4th day of March, 1982.

/s/ JUAN G. BURCIAGA
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CIVIL NO. 80-623-JB

JOSEPH and JOSEPHINE A., by their next friend,
CORRINE WOLFE, et al.,

Plaintiffs,

—VS.—

THE NEW MEXICO DEPARTMENT OF
HUMAN SERVICES, et al.,

Defendants.

PARTIAL TRANSCRIPT
SECOND DAY OF TRIAL
March 4, 1982

BE IT REMEMBERED that on-wit, the fourth day of March, 1982, this matter came on for the second day of trial before the HONORABLE JUAN G. BURCIAGA, United States District Judge, sitting in open court in Albuquerque, New Mexico, at the hour of two o'clock in the afternoon.

[2] APPEARANCES

FOR THE PLAINTIFFS:

CHILDREN'S RIGHTS PROJECT
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036
by: Ms. Marcia Robinson Lowry
Mr. George Kannar
CONWAY & LEVY, P.A.
Attorneys at Law
1001 Gold Avenue, Southwest
Albuquerque, New Mexico 87102
by: Ms. Susan Conway

FOR THE DEFENDANTS:

SHAFFER, BUTT, THORNTON & BAEHR, P.C.
Attorneys at Law
400 Gold Avenue, Southwest
Albuquerque, New Mexico 87192
By: Mr. John Klecan

[3] THE COURT: During the recess, I reviewed those excerpts of the depositions provided by the plaintiff. There were three depositions there were not any summaries to, Ms. Lowry, so I did not have an opportunity or time to review those.

As I stated earlier, this matter comes on for a class certification.

The plaintiffs have asserted certain violations of constitutional rights and rights provided by state laws under which they bring this action. And from a review of the evidence, at least one pattern appears to emerge. The that is, taking the testimony of all the witnesses for the plaintiffs, which would be Mr. Ortiz y Pino, Miss Sakara and Mr. Paull and Mr. Gilbert and Professor Stein, there evolves a pattern of inactive planning in the foster care program, that there appears to be no meaningful progression to a goal, that there is little evidence of supervisory input and there appears to be lack of standards or adherence to standards.

[4] With regard at least to Joseph and Josephine, there appears to evolve evidence of a high turnover of caseworkers with the subsequent result of inconsistent treatment.

It also appears that one out of every four cases in the foster care program, there is no case planning. In one out of three cases, there was no plan for family participation or family visits. And less than one-third of those case that involve termination were referred for adoption. And one out of three cases had no hope of getting out of foster care. There is a conflict in the evidence, but it's clear, at least from what has been presented thus far, that the term of children under the foster care program varies from four point six years, to seven years, as the average time in foster care. And it would appear to be an inescapable conclusion that the foster care program is nothing more than a long-term custodial care program.

As to the foster care services, there appears to be few formalized plans in the field. The evidence at least suggests that the training is severely limited, that there is not formal orientation for—orientation process for new employees, and

whatever is afforded, is conducted by supervisors who are also limited in skills.

It also appears that there is not standardized system of case review, and what is clear from the record is that there [5] is poor and unsound legal advice or legal support in the program which results in inconsistent and undesirable results which have a negative effect on adoption procedures.

Those expressions of the Court will constitute the findings of fact regarding class action.

When making the initial determination in a class action, the Court does not and should not base its determination on the merits or demerits of the plaintiffs' individual cases. In order to qualify for certification, the plaintiffs must satisfy each requirement of Subsection A, Rule 23, and in addition thereto, at least one of the elements under 23, Subsection B.

First it goes without saying that there must initially be a class. The limits of the class must be so that the class is determinable. It cannot be defined so broadly as to include individuals that have little connection with the claim being litigated. This element is typically call the numerosity requirement.

The evidence is unclear, the plaintiffs claim, avers a class of five hundred, but I think the proof before the Court suggests that there may be as many members as—at least in the area from nine hundred to eleven hundred, which conceivably could be affected by the relief which might be granted by the Court in the event the plaintiffs were to prevail.

Also, it's implicit in the first requirement that the [6] plaintiffs must be members of a class, although the position of the plaintiffs varies somewhat in that some of the plaintiffs are voluntarily committed to the foster care program by their parents and others result there by court action, the Court feels that there is—that the element or the requirement of a class, the existence of a class and the numerosity requirement has been satisfied.

For purposes of the record, another way to express this requirement is that there must be a nexus between the status

of the individual plaintiffs and the class they purport to represent. And the Court finds that there is indeed such a nexus.

The second and third requirements are that there must be questions of law or fact common to the class, and that the claims or defenses must be typical of the class. These elements commonly or typically referred to as the commonality and typicality requirements.

These seem to be duplicative, and many courts have tended to treat these two requirements together, and this court will also treat them as being duplicative and will treat commonality and typicality requirements together.

And again, the Court finds that there are common questions of law and fact, common to all the members of the class, and that the claims or defenses which may be raised to the averments of the plaintiffs are also common and [7] typical

And the last requirement is adequate representation by the wealth of legal talent representing plaintiffs. The Court finds no problem in determining that they will be able to satisfy the requirements of the case and can fairly and adequately protect the interests of the class.

So those will be the conclusions of law regarding the motion for a class certification.

The Court has not committed itself, however, to one single class. From hearing the evidence before the Court it at least appears at this early date that there might be a necessity for subclassing at a later time, but the Court will take that under consideration after the Court has heard more evidence. But at this stage, at least we've progressed sufficiently to establish the certification of the class.

Now, Mrs. Aguilar, I want to make some comments regarding your complaint in intervention. From a review of that, it appears that you're seeking to intervene, at least through one person, intervene as a class of parents, it that correct?

MRS. AGUILAR: Yes, Your Honor, it is.

THE COURT: At least—and I'm not so ruling at this time, Mrs. Aguilar, but it would appear to be extremely difficult to

handle in the present state, and to permit the intrusion or the intervention of another class will be extremely difficult in the view of the Court. And also, I'm [8] convinced that inasmuch as the plaintiffs here are seeking remedies in the foster care program and asserting violation of certain rights, either liberty or property interest, now that would have any common ground with anything that might be asserted by a class of parents. I'm saying this more or less to prepare you because at least it's my present thinking although I have not yet ruled, that I would not be able to allow intervention as a class, but at least for the moment, it would not be improper to permit the intervention of individual parents that might be affected by any particular relief that the Court might grant in this case. But I will have a decision in short order on your motion to intervene.

MRS. AGUILAR: Thank you, Your Honor.

THE COURT: All right. Anything further to come before the Court?

MR. KLECAN: No, Your Honor. Thank you.

THE COURT: The Court will enter its order certifying a class and ordering that the—this action will be maintained as a class action.

Anything further?

MS. LOWRY: Nothing, Your Honor.

THE COURT: Court will stand in recess.

(THEREUPON, the court was in recess.)

[9] REPORTER'S CERTIFICATE

I, Howard W. Henry, a Certified Shorthand Reporter for the United States, DO HEREBY CERTIFY that I reported the foregoing case in stenographic shorthand and transcribed, or had the same transcribed under my supervision and direction, the foregoing matter and that the same is true and correct record of the proceedings had at that time and place.

I FURTHER CERTIFY that I am neither employed by nor related to any of the parties or attorneys in this case, and that I have no interest whatsoever in the final disposition of this case in any court.

WITNESS MY HAND this 4th day of March, 1982.

/s/ HOWARD W. HENRY
Certified Shorthand Reporter

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